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THE FALLACIES OF OBJECTIONS TO SELECTIVE CONSCIENTIOUS OBJECTION

Amir Paz-Fuchs, Michael Sfard***

*Human history began with an act of disobedience, and it is not
unlikely that it will be terminated by an act of obedience.*

Erich Fromm¹

Abstract

This paper critically analyzes the theoretical and pragmatic arguments raised against the refusal of individuals to serve in a specific military campaign that they view as immoral. The Israeli Supreme Court case of *Zonshein v Judge-Advocate General* will serve as an axis of the discussion, as it combines two related facets: first, the Court's decision touches upon most of the difficult issues in the field of conscientious objection. And second, the development leading up to the decision was accompanied by an exceptional clash of academics, each side summoning expert opinions in support of its claim.

Courts worldwide have accepted that a categorical distinction exists between universal and selective conscientious objection. The combination of the *Zonshein* decision and the accompanying academic debate presents the opportunity to reexamine the theoretical and pragmatic reasons that are offered as support for distinguishing the two 'types' of conscientious objection. Close scrutiny finds them wanting.

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¹ Erich Fromm "Disobedience as a Psychological and Moral Problem" in Laurence Behrens,

I. *Introduction*

This paper critically analyzes the theoretical and pragmatic arguments raised against the refusal of individuals to serve in a specific military campaign that they view as immoral. The Israeli Supreme Court case of *Zonshein v Judge-Advocate General*² will serve as an axis of the discussion, as it combines two distinct facets: first, though far from the lengthy, the decision of the Court, delivered mainly by President Barak, touches upon most of the difficult issues in the field of conscientious objection. Second, the development leading up to the decision was accompanied by an exceptional clash of academics, each side summoning its expert opinions in support of its claim.

Following the lead of courts worldwide,³ the Israeli Supreme Court accepted the claim that while universal conscientious objection, i.e. pacifism, should be honored selective conscientious objection cannot be recognized by a democratic state. The litigation before the Court underscores the uncommon phenomenon that a theoretical distinction embraced by courts worldwide (including the Israeli Supreme Court) is found meaningless by some of the most prominent contemporary political and legal philosophers.⁴ This relatively new distinction offered by the courts, between universal and selective conscientious objection, may not be unrelated to the assessment that “originality in this sphere [of democratic resistance] is almost always a sign of error”.⁵

Leonard J. Rosen, eds. *Writing and Reading Across the Curriculum* (New York, Longman, 6th ed, 1997) 398

- 2 H.C. 7622/02, *Zonshein v Judge Advocate General*, 57 (1) P.D. 726. For the English translation of the *Zonshein* case see this issue of the *Israel Law Review*: “*Zonshein v. Judge Advocate General*,” (2002) 36 *Israel Law Review* 1. Citations below refer to the English translation in this issue.
- 3 For an overview see A. Giuffre, ed. *Conscientious Objection in the EC Countries* (Giuffre, Milan 1992) 259. There are, however, exceptions. Australia grants provision to “persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations” – Defense Act 1903 s 61A (“Persons exempt from service”); Conscientious belief is defined in section 4 of the Act.
- 4 We recognize the fact that in the past other views were professed: e.g. Lewis F. Powell, Jr., “A Lawyer Looks at Civil Disobedience,” (1966) 23 *Washington and Lee Law Review* 205.
- 5 Sidney Hook, *The Paradoxes of Freedom* (Berkeley, University of California Press, 1962) 106.

The argument that this paper advances may begin, therefore, from the following vantage point. It can take as a given not only that the right to freedom of conscience is recognized in Western democracies, including Israel, but also that on the basis of that right, exemption has been granted to universal conscientious objectors. The crux of the argument lies in the putative distinction between universal and selective objection. We maintain that no theoretical or pragmatic argument that has been offered by academics or by the courts manages to justify, on the whole, a *categorical* distinction between the two. We do acknowledge, in various parts of our paper and especially in our closing chapter, that the pragmatics of recognizing the two kinds of objection may differ. This does not imply, however, that the same principles that justify recognizing one do not apply when considering the other, or that the arguments against recognizing the right are weightier in the case of selective conscientious objection. On the contrary: since the two types of objection correspond with two groups of people that do not overlap, we assert that nothing in the arguments against selective conscientious objection manages to transfer the gap between them from a discriminatory practice to the safe haven of a legitimate distinction.

The context of the *Zonshein* decision, of refusal to participate in a particular “project” that the armed forces are involved in, governs the arguments that this paper deals with. That said, the discussion bears directly also on the refusal of young conscripts that refuse to serve in a particular army as long as it is engaged with such projects. This will be clear from some remarks throughout the essay and more directly towards the end of the paper.

We begin with a brief overview of the recent history of selective conscientious objection in Israel, then turn to the objections under examination, and conclude with what we view as the implications of our discussion.

II. *No Sun From Shine to Zonshein: The Tale of Conscientious Objection in Israel*

In December 1983 Ya’acov Shine, a member of the Israeli military reserves, received a summons that required him to report to a base in Northern

Israel. From there he was to leave for a month's service in Lebanon. Shine, viewing the Lebanon war as both illegal and immoral, refused to report to his base. He was disciplined and sentenced to a prison term of 35 days. Upon his release, Shine was summarily handed a second order to serve in Lebanon, under the new rules designed to deal with "the ideological organization of soldiers in military reserves who refuse to obey orders to serve in Lebanon". These new rules worsened the situation of conscientious objectors in the military reserves in two respects: first, the time a conscientious objector "served" in prison was discounted and, second, the requirement to hand an individual a summons at least 42 days before his or her starting day of service was disregarded. Shine petitioned the Supreme Court on grounds that were predominantly legalistic. The Court, in rejecting the petition, also distinguished universal conscientious objection from "selective" conscientious objection. While universal conscientious objection is, in effect, pacifism, the selective conscientious objector declares that his moral beliefs do not permit him to serve in a designated military campaign or to serve in a military force that is engaged in acts he views as immoral.⁶ The Court's pronouncement, despite being an *obiter dictum*, serves to this day as the cornerstone of the judicial attitude to conscientious objection.

The Court in *Shine* found that as far as male soldiers are concerned,⁷ neither universal nor selective conscientious objection could be recognized. The Court added that even in countries such as the United States, where pacifists are exempt from military service, similar provision is not granted to selective objectors.

Since laying down the *Shine* decision, the Israeli Supreme Court made mention of it in several judgments, never questioning its rationale.⁸

6 Despite it being a problematic decision, we consciously chose to use the masculine form throughout the paper. This is because the nature of draft laws, in Israel and worldwide, leads to a situation that is problematic only to male, and not to female, conscientious objectors.

7 Israel is the only country in the world that practices conscription for women. However, the underlying patriarchal approach led to an interesting case of discrimination against men, as the legislation (*Defense Service Law (Consolidated Version)* 1986 §39(c)) provides that only women are granted provision as conscientious objectors.

8 H.C. 630/89, *Machnes v. Chief of Staff*, unreported; H.C. 329/87, *Sorko-Ram v. Minister of Defense* 43(4) P.D. 873; H.C. 3246/92, *Har-Oz v. Minister of Defense* 46(5) P.D. 301; H.C. 1996/95 *Tisona v. Minister of Defense* (unreported).

Following the decision, military commanders have ordered the imprisonment of dozens of soldiers who refused to serve in Lebanon, and hundreds more were incarcerated during the first *Intifada* in the years 1987–1993 for their refusal to serve what they saw as an immoral and illegal occupation. But though the *Shine* decision was never overturned, several legal developments created a new legal background that chipped away at the *Shine* structure. First, in 1991 Israel ratified the International Covenant on Civil and Political Rights (Hereinafter: ICCPR). Article 18 of the ICCPR grants the right to freedom of conscience. In addition, the UN Human Rights Committee has declared, in a General Comment, that a right to conscientious objection can be derived from article 18 “inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.”⁹ The Committee also recommended that states should not practice a different approach to conscientious objectors on the basis of the nature of their particular beliefs.¹⁰

In light of the new obligations, Israel recognized, for the first time since its establishment, the right of male conscientious objectors to refuse to serve in the army on conscientious grounds.¹¹ The 1986 Defense Service Law (Consolidated Version) enabled the Minister of Defense to exempt a person from the duty of regular or reserve service “for reasons of education, security, settlement or the national economy *or for other reasons*”.¹² The Minister of Defense made the most of the latter catch-all criterion, and ordered the army to arrange for provision for conscientious objectors.¹³ This was done through the formation of a “Conscience Committee”. The administrative implementation was less than remarkable, however. The Committee was criticized for the fact that its members were all military personnel and that only a suspiciously low percentage of pleas was granted.¹⁴ But more important for our purposes was the instruction of

9 HCHR, CCPR General Comment 22, The Right to Freedom of Thought, Conscience and Religion, paragraph 11.

10 *Ibid.*

11 As for women, see *supra* n. 7.

12 The Defense Service Law (Consolidated Version) 1986 §36 (emphasis added).

13 Discussed in HCJ 1380/02, Ben Artzi v. Minister of Defense P.D. 56(4) 476.

14 A recent case (*Ben-Artzi – ibid.*) revealed that the committee granted provision to individuals only three times in eight years (3% of the total number of applicants). It was

the Minister of Defense that the Committee could grant leave only to universal conscientious objectors, i.e. pacifists.

A major change in the background legal structure came in the form of the 1992 Basic Law: Human Dignity and Freedom, which is now generally accepted as part of Israel's "mini-constitution". The fact that the Supreme Court read the right to freedom of conscience and religion into the concept of human dignity raises both freedoms to the level of a constitutional right.¹⁵ Lastly, successful judicial challenges to the army's reluctance to open certain positions to women¹⁶ have weakened some of the justifications underlying the distinction between men and women in relation to the provision on the grounds of conscientious objection.

This was the state of affairs in January 2002, when 50 conscientious objectors published a petition declaring their refusal to fight beyond the 1967 borders. The objectors declared their willingness to continue to serve in the Israeli army in any mission that serves its defense, but at the same time – made clear that they do not see "missions of occupation and oppression" as serving that purpose.¹⁷

The "exclusivity" of the group, consisting of individuals who served in the past as combat officers and soldiers, highlighted the selective nature of their objection. They protested not against the existence of an army as such, but rather against the role Israel's army plays in the occupied territories. Within several months, the group's number rose to over 500, an unprecedented number of conscientious objectors in Israel.¹⁸

By May 2002, over a hundred group members were sentenced to prison terms by their commanding officers. Matters took a slightly dramatic turn when Lieutenant David Zonshein, one of the first signatories, was called to serve in the occupied territories. After declaring his own refusal to

also revealed that the committee members are all military personnel who deliver judgments without being trained or educated for their task. Following judicial and public criticism, philosophy professor Avi Sagi was added to the committee.

15 H.C. 3261/93, *Manning v Minister of Justice* 47(3) SC 282, 286; H.C. 4298/93, *Jabbarin v Minister of Education*, 48(5) P.D. 199.

16 H.C. 4541/94, *Miller v Minister of Defense* 49(4) P.D. 94.

17 *Courage to Refuse* – Combatant's letter, <http://www.seruv.org.il/defaulteng.asp> (1 September 2003).

18 Michael Sfard is a signatory on the petition as well as legal counsel for the group.

serve in the territories, Zonshein raised the stakes considerably by also refusing to stand trial before a disciplinary tribunal, and demanded a hearing before a military criminal court. Though such a proceeding would grant Zonshein the right to counsel and the opportunity to make his argument at length in a public forum, it also had a serious disadvantage: while the maximum prison term Zonshein could be subjected to under disciplinary proceedings was 35 days, a military court may send a soldier convicted of refusing a direct order to a prison term of up to three years. The army authorities, presumably wary of the publicity such a case might involve, refused, and Zonshein petitioned the Supreme Court for the right to a trial before the military court. The Supreme Court, per President Barak, offered a unique arrangement: instead of dealing with the narrow issue of the right to a military trial, the parties would skip all intermediary proceedings and raise all substantive matters directly before the Supreme Court. The parties agreed.

Predictably, the government relied heavily on the *Shine* judgment, claiming that a democratic government cannot recognize the right to selective conscientious objection. In support of its claim, the government presented an expert opinion drafted by Prof. Ron Shapira and Prof. Avi Sagi, who relied on theoretical distinctions provided by political and legal philosophers including John Rawls, Ronald Dworkin, Joseph Raz and David Heyd.¹⁹ Zonshein responded by providing expert opinions on his behalf, rejecting the theoretical claims. In addition to a submission by Prof. Alon Harel,²⁰ expert opinions were also offered by Prof. Joseph Raz²¹ and Prof. David Heyd,²² in a manner reminiscent of Annie Hall's Marshall McLuhan.

After pressuring the parties to waive all preliminary arguments, the

19 Ron Shapira and Avi Sagi, "A Critical Examination of the Refusal to Serve in the Territories Under Current Circumstances – Is It a Conscientious Objection", attached to the respondent's arguments in *Zonshein*, 25/7/2002. See also Avi Sagi and Ron Shapira, "Civil Disobedience and Conscientious Objection," (2002) 36 Israel law Review 181.

20 Alon Harel, "A Critical Examination of 'A Critical Examination of the Refusal to Serve in the Territories Under Current Circumstances – Is It a Conscientious Objection'". See also Alon Harel, "Unconscionable Objection to Conscientious Objection: Notes on Sagi and Shapira," (2002) 36 Israel law Review 219.

21 Joseph Raz, *Letter to Michael Sfard* (copy with authors).

22 David Heyd, *Letter to Michael Sfard* (copy with authors).

Court saw the question of selective conscientious objection as the only one to be decided. In its decision, the Court moved to embrace the *Shine* remarks, this time as a *ratio decidendi*, and added various other rationales, theoretical and pragmatic, that led to a decision rejecting the right to selective conscientious objection. Though the Court declined to declare a winner in the academic showdown, we find the opposing theoretical positions considered by the Court conducive to the analysis of arguments relating to selective objection.

We turn to them now.

III. *Objections to Selective Conscientious Objection*

Traditionally, Western countries have granted exemption from military service only to people who opposed war in general on the basis of religious scruples.²³ The historical logic was that one's own conscience should be respected if he or she is following "an inner presence of divinity".²⁴ Following this reasoning, the US Congress legislated that provision for conscientious objection be dependent on religious grounds.²⁵

Israeli legislation followed, granting provision to ultra-Orthodox Jews, though the reasons for doing so were somewhat more complex and are not relevant to the present discussion.²⁶ What is striking, however, is the privileged status that secular states have accorded to conscientious

23 The idea to exempt conscientious objectors from the duty to bear arms on the basis of religious scruples goes back to James Madison's proposal for an American Bill of Rights – Kent Greenawalt "All or Nothing at All: The Defeat of Selective Conscientious Objection" (1971) 31 Supreme Court Review, at 40.

24 Michael Walzer, *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge Mass., Harvard UP, 1970) 122.

25 Military Selective Service Act 50 USC § 456(j) (as amended).

26 Immediately following its establishment, Israel agreed to grant provision to several hundred ultra-orthodox Jews so as to enable them to rebuild the "Jewish world of learning" that was almost completely annihilated during the Holocaust. Even though the numbers grew, all ultra Orthodox Jews were granted exemption from military service on condition that they sign a declaration that "their learning is their vocation". This highly contentious issue has been brought before the Supreme Court several times by secular groups claiming discrimination. The most recent charge was accepted by the Court (H.C. 3267/97, Rubinstein v Minister of Defense, 52(5) P.D. 481), but the practice

objection for religious reasons, while waging a political and legal campaign against conscientious objectors that rely on moral (secular) grounds.

Formally, the distinction between secular and religious reasons for an individual's refusal to engage in any military campaign is now a matter of the past in Israel. As mentioned, Israel established a "Conscience Committee" that, despite its drawbacks, removed the formal discrimination between grounds for granting provision to conscientious objectors. The American Supreme Court took a different tack. Recognizing the problematic aspect of discrimination against secular beliefs, the Court chose to interpret religion in an instrumental fashion, stating that "the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion in the registrant's life" and so what is necessary is "that these beliefs be held with the strength of traditional religious convictions".²⁷

So, though the formal secular-religious divide has been mitigated, the distinction between universal and selective conscientious objection has taken its place. We turn now to inspect the validity of seven arguments in favor of this distinction: the argument that focuses on the substantive matter; the democratic argument; the solidarity or pragmatic argument; the argument that focuses on the scope of the objection; the argument that highlights the public nature of the dissent; the argument focusing on discrimination; and the argument that selective conscientious objection claims cannot be fairly determined due to their inherent vagueness.

A. *The Substantive Matter*

We may begin the exposition of the arguments by clearing out of the way an argument that carries the least weight, yet seems to confuse public debate time and time again. The argument obfuscates the claim for or

continues, to a large degree, now with legislative backing. See Postponing Military Service of Yeshiva Students Act 2002.

27 *Welsh v. United States* 398 US 333, 339, following *United States v. Seeger*, 380 US 163. Harlan J., while concurring in the result, chose the more direct approach of declaring the discrimination unconstitutional, and observed (p. 351) that while it requires "a remarkable feat of judicial surgery to remove ... the theistic requirement", the majority has performed "a lobotomy and completely transformed the statute".

against the form of dissent with the substantive issues underlying (and motivating) the dissent. Thus, Shapira and Sagi argue:

The moral conscientious objector adopts a moral position which is at best awkward: he thinks that morally speaking even if the IDF has a clear indication that an act of terror is going to take place and even if the IDF or the security services cannot find the terrorists, it is impermissible to prevent the act of terrorism if by preventing it the freedom and dignity of innocent people will be compromised. In other words, he appreciates the values of freedom and dignity as more weighty than life itself.²⁸

A similar, albeit more general, argument is given by the American Supreme Court in *Gillette*. Stressing the subjective nature of the claim, the Court there implied that in order to be effective, the substantive premise underlying the reason for an objection has to be proven objectively true:

Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, *the claim is ultimately subjective*, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole.²⁹

The objectors will argue, of course, that they are governed and driven by the value of life, and not working against it. Their objection is driven by the belief that their actions enhance the possibility that lives will be saved. But this is very much beside the point, for they may be utterly wrong. Regardless of the merits of the argument itself, the fallacy of the approach presented under this heading lies in the fact that respecting one's right

28 See Shapira and Sagi, position paper, *supra* n. 19 at 5.

29 *Gillette v United States* 401 US 437, 456 [emphasis added].

to conscientious objection does not rely on the tenability of one's claim. Indeed, the only truth that requires examination in the case of conscientious objection is the claimant's subjective truth, i.e. – the verification that the objector is truly conscientious.³⁰ We may accept that there is a stronger connection between political context and the cause for objection in the case of the selective objector, when compared to the pacifists. The latter objects to service in any army no matter what the precise context is. The selective objector is required to scrutinize the facts before formulating his decision, and his assessment of the facts or his analysis of their consequences may prove to be wrong. And yet his claim is not worse off because of this. Indeed, if the government accepted the objectors' case as just and true – it should not only refrain from subjecting them to criminal proceedings, but should also change its laws or policy (in this case – withdraw from the territories) to conform its actions to these truths. In that case, the right to conscientious objection should not surface except to make the government aware of its mistaken actions.

The government is not expected to verify the "truth" of the belief, but rather only to assess if the objector's belief is "truly held".³¹ This is why Raz states that arguing for a right to conscientious objection "implies conceding that because someone *wrongly* believes that military service is morally prohibited for him he should be allowed to opt out".³²

B. *The Democratic Objection*

One of the more serious arguments against recognizing the right to selective conscientious objection goes as follows: pacifism, as is implied by its totality (refusal to engage in any war, regardless of the consequences, political or other) rests on a platform of conscience. The right to universal conscientious objection should thereby be respected in a manner that acknowledges the weight granted to an individual's dignity and self-respect. Contrariwise, the decision to participate in one military campaign

30 Chaim Cohen, "Conscientious Objection," (1968) 78 *Ethics* 269 at 270.

31 *Seeger, supra* n. 27, at 185.

32 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon Press, 1979) 277 [emphasis in original].

and not in another (or to refuse to join the army as long as it pursues certain ends) is, at bottom, a political agenda. In a representative democracy, governments are the organs entrusted with the power to decide between opposing political agendas and to carry them out. Courts have relied heavily on this argument when rejecting claims for selective conscientious objection.

But it seems that President Barak tried to prove too much in *Zonshein*, when he stated that “it becomes difficult to distinguish between ... objecting to a state policy and between conscientious objection to carry out that policy”.³³ For “state policy” may conflict with either kind of objection – universal or selective. A decision to wage war may offend the conscience of the selective objector, but it surely will create problems for the pacifist. It may be argued that it is the government that chooses the policy. The conscience reacts to the policy chosen. Therefore, stating the tension in this manner would not reinforce the distinction between universal and selective conscientious objection, but rather to state the (obvious) problematic facet of *any* kind of conscientious objection: the fact that an individual’s beliefs do not coincide with government policy. But, for present purposes, we may assume that Barak was making a claim that is similar to the opinion added by Justice Beinisch: “Many among us desire to set the limits of obedience according to their own beliefs and consciences, and even according to their own political perspectives”. And, in similar vein, the American Supreme Court stated that “opposition to a particular war may more likely be political and non-conscientious than otherwise”.³⁴ These statements can be understood in two distinct fashions: they may be concerned with the nature of democracy and political participation, or they may be expressing skepticism regarding the *true* motivation behind the objection. We are concerned here with the former understanding, and shall confront the merits of the latter below.³⁵ The argument is a potent one, especially in democracies that guarantee political

33 See *Zonshein*, *supra* n. 2, at 14–15.

34 See *Gillette*, *supra* n. 29, at 455.

35 Insofar as the concern is on a conceptual level, dealing with the correct categorization of the dissent, it will be addressed in section 4. It may well be the case, however, that the argument is not conceptual, but evidentiary, i.e. that the objectors’ declared motivations are not to be believed. This will be remarked upon towards the end of this chapter.

participation.³⁶ But while elected governments may claim that individuals are expected to submit to policies that are advanced, it is quite a different matter to require an agent who vehemently objects to such a policy to participate in its implementation. Forcing an individual to strive for an end he cannot share is “a particularly serious violation of the Kantian requirement that we treat humanity not merely as a means, but also as an ends”.³⁷ Thoreau may have been referring to precisely this point, when he stated as follows:

If the injustice is part of the necessary friction of the machine of government, let it go, let it go: perchance it will wear smooth – certainly the machine will wear out... but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine.³⁸

As Michael Walzer argues, while refusal to submit may indeed pose a danger to government’s ability to rule, the refusal of some to conscription (in general or to a particular military campaign) does not undermine the process *in toto*, as only those who profess serious opposition will be released. Walzer adds, and justifiably so, that if the democratic argument rests on some idea of consent (say, through voting) recognizing a right to selective objection would actually enhance the moral seriousness of the process.³⁹

We may wish to understand the democratic objection in a more abstract

36 See Hook, *supra* 5, at 112.

37 Thomas Nagel, “Moral Conflict and Political Legitimacy,” (1987) 16 *Philosophy and Public Affairs* 215, at 238.

38 Henry David Thoreau “Civil Disobedience” reprinted in HA Bedau, ed. *Civil Disobedience* (New York, Pegasus, 1969) 27, at 35. Of course, the decision when one becomes an “agent” rests on a continuum. Thoreau himself was imprisoned for his refusal to pay taxes that funded what he saw as an unjust policy. Such a wide definition of agency would indeed lead to a justified threat to state authority. We may therefore satisfy ourselves with a narrower approach to agency, whereby one is required to participate in the execution of what he deems as an offensive policy, in a more direct fashion.

39 Walzer, *supra* n. 24, at 137. The distinction, though similar, is not between acts of commission and acts of omission. A person who objects to any form of taxation will still

fashion. It should be stated that this approach, though intellectually stimulating, was never taken up by courts. Here “politics” is understood in its inspirational, ancient-Greek form, and not in the derogatory fashion in which it is sometimes used in everyday life. While objecting to the different treatment of selective and pacifist objectors, Potter presents this objection neatly:

The selective objector differs from most pacifist objectors in that he is not claiming exemption on the basis of an odd but seemingly innocuous preference for a vocation that transcends politics...

The vocation of the nonpacifist selective objector is not beyond politics; it *is* politics, ‘true’ politics. From some higher source... he has come into possession of the true norm of political conduct and is intent upon applying it here and now, condemning these and condoning those... The subject matter he treats is not the nature of his own calling but rather the nature of the true state. His very existence is an accusation aimed directly at the heart of the political organism. He is, in relation to incumbent powers, essentially subversive, a subversive made more dangerous by the nobility of the norms he invokes.⁴⁰

Though placing the political objection on such a high pedestal could indeed be perceived as laudable, by doing so the motivation for objection becomes much more akin to those associated with moral or philosophical grounds, and distinct from a “personal moral code”.⁴¹ If this is the case then, indeed, the “effort to distinguish between “being committed to a political doctrine”

be required to submit to the majority decision and pay taxes. The state should, however, exempt such a person from serving as a tax collector even if conscription for this position was implemented.

40 Ralph Potter, “Conscientious Objection to Particular Wars” in Donald A. Giannella, ed. *Religion and the Public Order* (Ithaca, New York, Cornell University Press, 1968) 44, at 88.

41 Military Selective Service Act 50 USC § 456(j) (as amended); Cf *Welsh supra* n. 27, at 340.

from “being committed to a moral (religious) doctrine” is utterly hopeless and futile...”.⁴² The grounds for the objection to participate in military action, thus understood, gain the air of a comprehensive doctrine that carries significant value in the public debate and thus deserves protection. It becomes an important and valuable argument that should be considered part and parcel of true democratic theory. Such a contention is all the more valuable when countries are engaged in warfare, and public debate is stifled. Indeed, conscientious objection, if used with due restraint and sound judgment, may be seen as “one of the stabilizing devices of a constitutional system”.⁴³

This leads us to the next objection, which concerns the possible effects that conscientious objection may have on the solidarity of society and on the ability of the government to advance its policies.

C. *The Solidarity / Pragmatic Objection*

As mentioned, in rejecting the argument for selective conscientious objection, the Court expressed concern that “the people’s army will transform into an army of peoples comprised of various units, to each of which it would be conscientiously acceptable to act in certain areas, whereas it would be conscientiously unacceptable to act in others”.⁴⁴ The Court referred also to the particular circumstances in Israel, stating that

Yesterday, the objection was against serving in South Lebanon. Today, the objection is against serving in the West Bank. Tomorrow the objection will be against vacating this or that settlement.⁴⁵

This argument, though less complex on a theoretical level, undoubtedly

42 Walzer, *supra* n. 24, at 133; David B. Malament “Selective Conscientious Objection and the *Gillette* Decision,” (1972) 1 *Philosophy and Public Affairs* 363, at 375–376.

43 John Rawls “A Theory of Civil Disobedience” in Ronald Dworkin, ed. *The Philosophy of Law* (Oxford, Oxford University Press, 1977) 89, at 105. And see Ronald Dworkin *Taking Rights Seriously* (London, Duckworth, 1977) 219.

44 Zonshein, *supra* n. 2, at 14.

45 *Ibid.*

carries weight in public debates concerning conscientious objection. It is not clear, in the quote offered above or in other pronouncements of this claim, whether the worry stems from an abstract fear to the organic structure of society or, perhaps, from a pragmatic worry that if each member of society agrees to go along only with decisions that satisfy his own personal conscience, the state's capacity to carry out policies will be severely undermined. The two are connected, and counter-arguments can be offered.

John Rawls's remarks that concern the motivation for a democratic society to acknowledge pacifism may be regarded as an adequate point to begin a discussion of this argument:

The refusal to take part in all war under any conditions is an unworldly view bound to remain a sectarian doctrine. It no more challenges the state's authority than the celibacy of priests challenges the sanctity of marriage. By exempting pacifists from its prescription the state may even seem to display a certain magnanimity.⁴⁶

How different is the case of pacifism from that of selective conscientious objection? Is it true that while recognizing the pacifist's objection to take up arms has no effect on state authority, recognizing selective conscientious objection poses a clear and present danger to society's strength and solidarity? That does not seem to be the case. Indeed, "there is very little evidence that carefully limited, morally serious [conscientious objection] undermines the legal system or endangers physical security".⁴⁷ It may well be argued that by positing society's norms in opposition to pronouncements of radical, minority groups, the majoritarian values may be strengthened. On the other hand, coercing individuals to act contrary to their most strongly held beliefs, may assist in making them public icons and martyrs, thus exposing the state to charges of tyrannical behaviour and, paradoxically, increasing the rift between sectors of society.

46 John Rawls *A Theory of Justice* (Revised Edition, Oxford, OUP, Revised Edition, 1999) 335, borrowing the "ecumenical" metaphor from Walzer (n 22) 127.

47 Walzer, *supra* n. 24, at 17.

It seems to go without saying that the capacity of objectors themselves to feel part of society decreases when the state forces them to act in a manner that conflicts with their conscience.⁴⁸ Furthermore, it may be mentioned that the fear of mass disobedience that will spread like a plague seems to be more in the minds of politicians and lawyers, and stands contrary to research in the field of social psychology. Disobedient members of society are usually considered to be “an insignificant minority” and “a menace to society”.⁴⁹ In the article that served as the source for the epigraph of this essay, Erich Fromm discusses the psychological comforts of obedience and the discomforts of disobedience.⁵⁰ Fromm sees obedience as a pleasant state, enabling one to identify with the larger group and to feel protected by it. Milgram’s controversial experiments, uncovering the basic tendency of individuals to act solely so as to oblige an authority (however arbitrary) are now notorious. But their notoriety only partly moderates their conclusion that “obedience is as basic an element in the structure of social life as one can point to”.⁵¹

The pragmatic facet can be understood to be making a bureaucratic or a moral claim. By the former we refer to the argument that the government will lack the manpower to advance its policies. As such, the claim is no more than “an embarrassment” for the government.⁵² As David Malament shows, out of a total of over 20 million registrants aged 18 to 26 in the US

48 Ronald Dworkin argues that “jailing such men solidifies their alienation from society, and alienates many like them who are deterred by the threat”, See Dworkin, *supra* n. 43, at 207.

49 C.E Parry, *The Psychology of Conscientious Objection* (London, Daniel, 1920) 22.

50 Erich Fromm “Disobedience as a Psychological and Moral Problem” in Laurence Behrens, Leonard J. Rosen, eds. *Writing and Reading Across the Curriculum* (New York, Longman, 6th ed, 1997) 398.

51 Reprinted as Stanley Milgram, “The Perils of Obedience” in B. Laurence Behrens, Leonard J. Rosen, eds. *Writing and Reading Across the Curriculum* (New York, Longman, 6th ed, 1997) 359, at 360. For a similar experiment, see Philip G. Zimbardo “The Stanford Prison Experiment” – reprinted, *ibid.*, 385. While recognizing that both these experiments are extremely controversial from both an ethical and a methodological perspective, they indicate at the very least the individual’s basic tendency to obedience and should serve to alleviate some of the quick reservations based upon the anxiety from sliding into anarchy. This may be what Robert M. LaFollete referred to when he stated that “conscience is not so common among our citizens that we can afford ruthlessly to punish its possessors” – cited in Potter, *supra* n. 40, at 90.

52 See Malament, *supra* n. 42, at 381.

in 1968, over 7 million enjoyed deferments for reasons *other* than conscientious objection. By way of contrast, the number of registrants classified as selective conscientious objectors in June 1971 was 34,202.⁵³

It may be argued that the danger to government's ability to advance its policies is a pragmatic-moral one, rather than a bureaucratic one. In other words, the refusal of a substantial minority to adhere to majority rule may spread a feeling of anarchy and a greater unwillingness to comply on behalf of many others. If directed towards the objectors, the argument implies that they should refrain from acting according to their moral conscience just because by doing so they grace others with the moral prerogative to act in the same way, i.e. – to refuse to obey a policy that their conscience forbids. But aside from the fact that this objection is just as relevant a claim against pacifism, it seems also to be just one of the caricatures that the categorical imperative has been subject to. The reply to it is that a generalization or universalization of our moral decisions is more a moral (or ideological) extension than a logical one. In other words, the objector could readily agree that his acts may be understood to support a claim whereby *any* individual who is forced to take positive action towards furthering what he sees as illegal acts of government that also violate his conscience – should refuse. This is hardly the same as granting a recipe for anarchy in the form of “anyone should do what they feel right”.⁵⁴

Can governments make a pragmatic-moral claim? The conjunction of

53 *Ibid.*, at 381–384. The reasons included: education, fatherhood, hardship, and occupational or agricultural deferments.

54 For a similar argument see Dworkin, *supra* n. 43, at 214. We may defer judgment here on the “gray area” situations, and especially – on the matter of right-wing conscientious refusal to dismantle outposts. In the Israeli context the contention is made as follows: can, or should, the case of “Courage to Refuse” serve to strengthen such a cause? Two different answers can be offered: according to the first, the selective objectors here may be understood to claim a strong right only when one's conscience coincides with the principles of international law. Regardless of the substantive arguments within the context of international law, it is very clear that this is not the “higher source” that the right-wing is claiming adherence to. A second answer may simply agree to generalize the claim for conscientious objection further, and thus accommodate also soldiers who are required to dismantle outposts if it violates their conscience. It should be stressed, however, that this reasoning would apply only to those forced to be instrumental in the dismantling of settlements, and not to those *subjected* to the policy (i.e. forced to evacuate). See text to notes 37–39.

the two adjectives would suggest that such a claim may be viable only when the policy they wish to advance falls in the range of reasonably just policies. And the interest in advancing just policies, including just wars (assuming such wars exist) is hardly obstructed by granting provision to selective conscientious objectors. The minority's objection will only become a platform for the government and the majority to make their claims. It is unjust policies that may be affected. For unlike the wallflower effect that pacifists may have, the potential for creating a shift in policy, especially in the case of unjust war, is radically different. Rawls writes:

For such refusal is an affront to the government's pretensions, and when it becomes widespread, the continuation of an unjust war may prove impossible. Given the often predatory aims of state power, and the tendency of men to defer to their government's decision to wage war, a general willingness to resist the state's claims is all the more necessary.⁵⁵

So if the provision granted to selective conscientious objectors undermines mainly unjust policies, the moral underpinning of the pragmatic argument seems to wither away.

Another interpretation of the pragmatic argument suggests that the acceptance and toleration of selective conscientious objectors undermines military discipline.

This argument is undoubtedly true and powerful but when inspected as a filter through which pacifists supposedly pass while selective objectors falter, a few quandaries arise. The basic assumption of the discipline argument is that while pacifists do not take part in the military life, selective objectors do. The second prong is that discipline can only be offended by selective objectors and "regular" soldiers, as only they are subject to it, while pacifist are not.

There are three main difficulties with the above reasoning of the discipline argument: First, the assumption that military discipline is not damaged by the exemption of pacifists is not at all straightforward, especially when dealing with an army that is based on a mandatory draft.

⁵⁵ Rawls *supra* n. 46, at 335; Greenawalt makes a similar point, see *supra* n. 21, at 49.

It is true that if one is to understand discipline in the narrow sense of a commander's ability to control his subordinates – no immediate threat is observed by the fact that pacifists enjoy a total exemption from service. But there are indirect consequences to selective service. It may be claimed that the military organization as a whole is grasped, because of the pacifists, as more optional than compulsory. This is an offence to military discipline in the most fundamental sense. Second, if those who do not partake in military life pose no threat to discipline, than when dealing with selective objectors, the army may choose to forgo with the objector's "honey" and remove the disciplinary-sting by exempting them completely from service – thus placing them on a par with pacifists. This might be the correct balance of interests in applying freedom of conscience to selective objectors. It would charge many selective objectors with a real dilemma as many of them do not wish to be cast out of the army. It may be recalled that Zonshein's "courage to refuse" group is composed exclusively of combat soldiers and officers and, indeed, it is not uncommon for selective objectors to be leading army officers and loyal soldiers who are in many cases proud members of elite combat units. Thirdly, and intimately connected, the discipline argument does not capture the groups of selective objectors who object to any kind of service on selective grounds. For example, five young Israelis who refuse to enlist to an "occupying army" currently face military trials.⁵⁶ The argument that seeks to distinguish between selective and universal objectors on the basis of the effect on army discipline clearly fails in this case.

D. The Scope of Objection

This argument and the one immediately following, regarding the public nature of the dissent, emphasize characteristics of selective conscientious objection that, if accepted, would lead to a recategorization of the form of dissent. Both claim to be indicators that, taken together, would lead to the conclusion that the act in question is, in effect, civil disobedience. The arguments in the *Zonshein* decision and in the academic briefs that accompanied the adjudication will be used here to highlight the fact that

⁵⁶ MT 151/03 The Military Prosecutor v. Matar.

while the distinction between civil disobedience and conscientious objection is not only tenable, but also important in its implications, the distinction between selective and universal conscientious objection is groundless and unjustified. This may be the reason that the strategy employed by government lawyers sought to hinge upon the recognized characterization of different forms of dissent and to suggest the following parallel: conscientious objection is, in effect, only universal conscientious objection; selective objection is, actually, civil disobedience.

When assessing the two arguments we find that while the objection that will be discussed below, focusing on the nature of the dissent, may, under certain conditions, become an indicator of civil disobedience, the argument that views the scope of the objection as relevant is simply flawed.

The terminology should be explained first. By civil disobedience we refer to “politically motivated breach of law designed to contribute directly to a change of law or public policy”.⁵⁷ In light of its objective, civil disobedience is necessarily a political act, which takes place in the public sphere. This does not preclude, however, it also being a *conscientious* act.⁵⁸ Civil disobedience does not require that the law violated is the law protested against and sometimes, as in the case of protest against public policy, it is indeed impossible. This is sometimes referred to as the distinction between direct and indirect civil disobedience. Conscientious objection is a breach of law motivated by the fact that the agent sees himself or herself as morally prohibited to obey it, either because of its general character or because it extends to cases that should not be covered by it.

It is important to note that while conscientious objection tends to be respected in varying degrees amongst democratic countries, civil disobedience is considered to be an illegitimate form of political participation. Joseph Raz, for example, while recognizing the difficulty in arguing for a general right to conscientious objection, is inclined to demand that governments respect their citizens’ autonomy and life choices whenever possible. In contrast, Raz explicitly argues against a general right to civil disobedience in just democratic countries where political

⁵⁷ See Raz *supra* n. 32, at 263.

⁵⁸ See Rawls, *supra* n. 46, at 320–321; H.A. Bedau “Introduction” in *Civil Disobedience*, *supra* n. 38, at 23.

participation is granted (this does not, however, preclude justifying particular acts of civil disobedience).⁵⁹

Does the scope of the objection have any bearing on the classification of the dissent? The instinct may be similar to the previous discussion that saw selective conscientious objection as “more likely” to be political and nonconscientious.⁶⁰ But why this is the case is not clear. A political agenda may be extremely broad and vague (small government; international interventionism), while a moral objection, as Antigone exemplified over 2500 years ago in her defiance of Creon, may be remarkably specific. And as for the source of the objection – it is equally peculiar to assume that objection to wars in general is always moral (or religious), while an objection to a particular war cannot be moral-based (for example – because of the weapons used in it, or after finding that the reasons for embarking on the campaign were different from those originally professed and unjustified in and of themselves).⁶¹ Indeed, doctrines distinguishing between just and unjust wars have their origins in classical antiquity, and have been developed and refined by moral theologians such as Augustine, Aquinas and Suarez. This theory envisages unjust wars, but not just wars, as sacrilege and participation in them as sinful.⁶² So the concept of selective *religious* (as opposed to political) objection is quite established.

And the case for selective objection that is based on moral (again – not political) grounds is not dissimilar. As Joseph Raz stated in his expert opinion for the *Zonshein* case:

So-called “selective” conscientious objection is just ordinary conscientious objection. It is the government whose laws are

59 See Raz, *supra* n. 32, at 262–289. Sidney Hook, following the same reasoning, states that there could be no “right to revolution” in any system *supra* n. 5, at 113.

60 Judge Augustus Hand, in an oft-cited passage, described the two categories as mutually exclusive and as stemming from different motivations: “There is a distinction between a course of reasoning in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances... The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God...” *United States v Kauten*, 133 F.2d 703, (2nd Cir 1943), at 708.

61 See Greenawalt, *supra* n. 23, at 53–54.

62 See Potter, *supra* n. 40, at 67; Malament, *supra* n. 42, at 369.

broken which regards some conscientious objection as selective, and others as non-selective. The distinction is meaningless to the objectors. They can only object to what they find objectionable, and they are bound in conscience to object to that. If they object to all war then that is what they must object to. If they regard a particular war, or the use of a particular weapon, etc., as morally illicit then this is what they object to. They cannot be more or less selective. They are bound by their conscience, and cannot extend or contract their beliefs at will.⁶³

It is the biased perspective of governments and courts alike that view acts of selective conscientious objection as parts of an organic political apparatus⁶⁴ that is projected on the conscientious objector. Indeed, the examples offered by academic scholars on conscientious objection reveal that no regard is given to the scope of the objection. Military conscientious objection, for example, could amount to objection to serve in any armed service, to a particular military campaign or even to an order perceived as immoral.⁶⁵ But the counter-argument is not exhausted by rejecting the assertion that a selective objector is “more likely” to be motivated by political and nonconscientious reasons. Even if such a claim were acknowledged, arguendo, there is still ground to cover before reaching the conclusion that the right to selective conscientious objection should not be recognized in a particular case. Such a “sociological” claim cannot be used to obviate a particular conscientious objector from proving that his personal objections are strictly moral, and not politically motivated. Suppose we find that, over a period of time and in a particular society, the right to free speech (or the right to counsel) has been abused in ways we find unacceptable. This finding should not lead us to the conclusion that the right should be revoked in general, including in a particular case. The argument, in short, assumes the factual basis that needs to be proved while denying the individual the opportunity to demonstrate his case.

63 See Raz *Letter*, *supra* n. 21, at 1–2. Dworkin expresses the same position in *Taking Rights Seriously*, *supra* n. 43, at 200–201.

64 See *Cf* the *Shine* judgment and text to note 5.

65 See Raz, *supra* n. 32, at 324; Rawls, *supra* n. 46, at 324.

E. *The Public Nature of Dissent*

As mentioned, conscientious objection is predominantly a private act. The agent, in essence, wishes he would not have the occasion to prove his conscientious beliefs. Contrariwise, civil disobedience has a public element, as it seeks to change a particular law or policy. This characterization may lead to the conclusion that Zonshein's insistence on a criminal trial that is open to the public is indicative of the public nature of the protest, and thus would give credence to the view that the dissent should be categorized as civil disobedience. And, indeed, this is exactly the argument offered by Shapira and Sagi:

The practice and the explicit reasoning of the persons who refuse to be drafted as well as their will to change the general view reveal that they do not act for personal-private reasons. Their wish to conduct a public trial that will publicize their acts and their motives indicates unambiguously that they act in the public sphere.⁶⁶

But this argument is fallacious. Conscientious objection involves not only the person's beliefs (which, perhaps ideally for him, would remain unknown to the public) but also his interaction with state authorities once demanded to act contrary to those beliefs. We therefore need a standard to discriminate legitimate conscientious objection (for example: of a doctor to conduct painful trials on animals) and claims based on self-interest. The touchstone distinguishing between the two is the claim to "moral seriousness". This requirement implies a willingness to act in public, to offer explanations and to worry about public consequences.⁶⁷ Martin Luther King wrote that "one who breaks an unjust law must do it *openly, lovingly* and with a willingness to accept the penalty".⁶⁸ It may seem

⁶⁶ See Shapira and Sagi, position paper. *supra* n. 19, at 4.

⁶⁷ See Walzer, *supra* n. 24, at 20; Greenawalt, *supra* n. 23, at 59; cf Raz, *supra* n. 32, at 279–280: To be sure, the objector desires to conform to his beliefs, but it is the fact that those desires reflect a moral belief, which distinguishes them from other desires of his and endows them with a special claim to our respect.

⁶⁸ Martin Luther King, "Letter from Birmingham City Jail" in H.A. Bedau ed. *supra* n. 38, 72, at 78 [emphasis in original].

paradoxical, but such tactics actually involve a much higher respect for the law than those based on quiet, evasive violations of it. Men who openly and peacefully disobey what they see as an unjust law and concede the penalty, if levied, are saying that they respect the idea of law to such an extent that they would rather sit in jail than obey an unjust law. As Thoreau remarked: "they are lovers of law and order who observe the law when the government breaks it".⁶⁹

Lastly, it is a truism that individuals may be driven by a multiplicity of motives. This is why some acts, such as selective conscientious objection to the Vietnam War, may be seen as providing examples of civil disobedience and conscientious objection in one act.⁷⁰ The argument examined in this section would require an agent to choose between engaging in an act of conscientious objection and protesting a policy through legitimate political participation. Even if understood as a claim that the *act itself* can be either an act of conscientious objection or of civil disobedience, this argument leads to absurdities.⁷¹ Let us recall the imprisonment of Henry Thoreau for refusal to pay state taxes which he saw as contributing to the maintenance of three evil acts: slavery, the Mexican War and the treatment of native Americans.⁷² The reason this imprisonment was considered "a pivotal moment in the history of the movement [of conscientious objection]"⁷³ is greatly connected to Thoreau's public vindication of himself, mainly through his celebrated essay. The argument focused upon here would see Thoreau's protest as indicative of his act being a case of civil disobedience, and not of conscientious objection. And yet, if his friend Ralph Waldo Emerson had desired to use Thoreau's case as a vehicle to galvanize a political protest, he would (presumably)

69 Cited in H Wofford, "Non-Violence and the Law: The Law Needs Help" in H.A. Bedau ed. *supra* n. 38, 59, at 68.

70 See Raz, *supra* n. 32, at 264. How should these cases be dealt with? In many cases, such as *Zonshein*, the chronological priority corresponds with the logical. That is: if *Zonshein's* right to conscientious objection would have been recognized, there would have been no need for any public form of dissent. We thank John O'Dowd for this counter-argument.

71 This counter-argument draws heavily on Harel, *supra* n. 20, at 3.

72 See Thoreau, *supra* n. 38.

73 George Woodcock, *Civil Disobedience* (Toronto, Canadian Broadcasting Corporation, 1966) cited in HE Bedau "Introduction", *supra* n. 38, at 16.

be well within his rights to do so. Can this right be denied Thoreau simply because he is sitting behind bars?

F. *Discrimination*

The discriminatory aspect of selective conscientious objection entertains both conceptual and administrative features. The latter will be addressed in the following section. The claim on the conceptual level argues that “it is neither proper nor just to exempt part of the public from a general duty imposed on all others”⁷⁴ and that, perhaps paradoxically, “selective conscientious objection would be broader than ‘full’ objection, and would evoke an intense feeling of discrimination ‘between blood and blood’”.⁷⁵ In the case of conscientious objection to serve in the military, the Hebrew metaphor that ended the quote may be understood quite literally.

The Court here makes the same mistake of offering an argument that, if accepted, would nullify *all* claims against conscientious objectors, be they selective or universal. Further, this is not a problem of phraseology, but rather a more significant difficulty altogether. For the Court seems to shift the groups compared in a manner that suits its objective: instead of comparing selective conscientious objectors to universal conscientious objectors, as it did throughout the decision, the focus now shifts to a comparison between selective conscientious objectors and those who have no such scruples whatsoever. For the comparison made here is between individuals who serve in the armed forces and those who do not serve, be they pacifists or selective objectors. It would hardly fit the objective of the Court to examine discrimination between pacifists and selective objectors but this, we maintain, is exactly what it should have done.

The distinction between individuals, whether just or unjust, is part of the human experience. It is true that not much is gained by stating that equality is achieved through the treatment of likes alike, apart from the fact that governments and societies have to apply the criteria used to distinguish between different groups religiously (the play on words is not inconsequential, as will be immediately apparent). But the right to equality

⁷⁴ See Zonshein, *supra* n. 2, at 10.

⁷⁵ See Zonshein *supra* n. 2, at 14.

is violated not only when persons in analogous situations are treated differently without an objective and reasonable justification. The right not to be discriminated against is also violated when states fail to treat differently persons whose situations are significantly different. So the refusal to consider the needs of people with disabilities in education or employment on the grounds that the standard chosen fits most (healthy) people will not do.⁷⁶ But we do not need to borrow our examples from spheres far and wide. The European Court of Human Rights has ruled that excluding a Jehovah's Witness from a chartered profession because he was convicted of insubordination (refusal to enlist in the army due to his religious beliefs) was discriminatory. While accepting that the government has a legitimate interest in excluding some offenders from a chartered profession, the ECHR stated that "a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession".⁷⁷ Treating all offenders alike, therefore, amounts to illegal discrimination.

Further, as mentioned earlier, exceptions to the draft have been generously granted to individuals professing religious scruples, and later on – to pacifists relying on moral grounds.⁷⁸ The decision to make provision for one group or another should be made on the merits justifying the distinction, not on the basis of a vague fear of distinguishing between groups. The fact that the distinction discussed here violates an independent right to freedom of belief and conscience should, we believe, strengthen the claim that it is the conscientious objectors that are being discriminated against.⁷⁹

G. *Vagueness*

The nature of the selective objector's resistance – being contextualised and

⁷⁶ Cf H.C. 7081/93, *Botzer v Maccabim-Reut Municipal Council*, 50(1) P.D. 19, Holding that a municipal council is obliged to guarantee a disabled child access to school facilities.

⁷⁷ *Thlimmenos v. Greece* (2001), 31 EHRR 15 at 412.

⁷⁸ See *supra* n. 26.

⁷⁹ For a similar view see Cohen, *supra* n. 30, at 277. Cf the ECHR's jurisprudence, demanding that to establish a violation of Article 14 (which prohibits discrimination on

precise – presents a “threshold problem” that combines substantive, pragmatic and psychological elements. The substantive elements have, to a great extent, been discussed above. We conclude the discussion of arguments against selective objection by addressing the administrative claim to erect a barrier between selective and universal objection and by offering a tentative explanation to the fact that though arguments such as those presented here do not past muster – they are repeatedly turned to.

The administrative objection was offered in *Gillette*, where the Court stated that perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining “who serves when not all serve.” When the Government exacts so much, the importance of fair, evenhanded, and uniform decision-making is obviously intensified... The contention is that the claim to relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decision-making in administrative practice.⁸⁰

It may be true that “preferential treatment raises problems of fairness, and an exemption from military service is certainly a kind of preferential treatment”.⁸¹ Amongst the reasons that feelings of embitterment will rise may be the lack of a clear definition of the class to be preferred, or that the line itself is not just. But these are actually substantive questions of discrimination only masked as administrative issues, and as such have been addressed. This leaves open the difficulty of structuring a bureaucracy that will engage with the most deeply held beliefs and objections of young individuals. It is indeed recognized that an administration true to realizing its mandate has to be wary of the fact that a system that inspects the beliefs of individuals is prone to some evils such as abuse, on the one

forbidden grounds) violation of an independent provision has to be shown : *Marckx v. Belgium* (1991) 2 EHRR 330. It should be mentioned, however, that Protocol No. 12 (4.11.2000) recognizes an independent right to equality.

80 See *Gillette*, *supra* n. 29

81 See Greenawalt, *supra* n. 23, at 50, 79. The hesitance to accept such an assertion is related to the fact that though a person who does not serve *seems* to enjoy preferential treatment, one must bear in mind the possibility that the person that does serve in the armed forces may be highly motivated to do so for various reasons, such as self-interest, patriotism, an assumption that it would “open doors” for him, etc. There is, however, a substantial group that may lie between the two extremes.

hand, and public intrusion into private affairs, on the other.⁸² But, once again, the same would apply to the onerous duty that is the part of administrative conscience committees that are charged to inspect the nature of a claimant's putative pacifism. Even if it were true that pacifism is easier to identify, when compared to truly conscientious objection, that still would not be a strong enough argument. Exempting only individuals with brown eyes is quite simple administratively, but that does not make the litmus test an appropriate one. And less sardonically, while it was once the case in America that only members of established religions were exempted from military service, the Court was reluctant to judge the additional administrative difficulty as a consideration that is significant enough when weighed against the right to equality. We do not claim that administrative difficulties carry no weight when considering substantive resolutions. But the *claim* to onerous administrative difficulties should not be enough to frustrate the affirmation of a right. It seems quite difficult to see why the need to inspect the substance and sincerity of beliefs of young men should present administrative difficulties that are as arduous as governments argue they are. Juries, as has been noted, make judgments in cases where intent or sincerity is a factor on a daily basis.⁸³ It would seem, then, that the decision to conduct demanding and difficult examinations has been made long ago, and we are now charged with making the best of it.⁸⁴

IV. *A Tentative Insight*

If all these objections to recognizing selective refusal falter, one by one, how may one explain the fact that decade after decade judicial challenges have failed? We offer our tentative insight, which rests on grounds that are admittedly not within our professional expertise. One possibility is that the pacifist's rigid and extreme view severs any attempt to make a comparison between moral perspectives. It is so ideal that it seems irrelevant. The selective objector, on the other hand, seeks to live within

82 See Raz, *supra* n. 32, at 287–288; Greenawalt, *supra* n. 23, at 34.

83 See Malament, *supra* n. 42, at 378–380.

84 See Cohen, *supra* n. 30, at 274.

society, share its values and norms and yet wishes to express his opposition to particular acts made on society's behalf. As such, he may be seen to be proclaiming a higher moral ground, an increased sensitivity that is not shared by members of the majority. When observing the selective objector, each member views *himself* as standing on a fork in the road, charged with deciding if he or she accepts the objector's substantive moral claim, or willfully admits his inferior moral standing. Due to the fact that the majority member and the objector share a similar general moral makeup, the option of acknowledging a *different* moral standard that should be accommodated, is not entertained. So the fork on the road is run over, and a third option is paved: branding the selective objector as a traitor, an outcast. Anecdotal evidence supports this assertion, as we find that the more targeted and precise the objection, the stronger the public disdain. Thus, we find at one extreme bafflement over the army's insistence to repeatedly prosecute young people who refuse to serve in the army altogether, while at the other extreme – members of Knesset suggesting that air-force pilots should be prosecuted as traitors if they refuse to participate in assignments in which civilians may be hurt.

A second, strongly related, observation can be made. A common view sees pacifism as a test of sincerity, and thus worthy of exemption, while the "insincere objector who would prefer to pick and choose which wars he will fight ... deserves less consideration".⁸⁵ This is not only a matter of a wish to maximize efficiency and expediency. The decisionmaker's moral sensitivities are offended by the claim that one may, in good faith and conscience, resort to violence in some circumstances and yet oppose the command to cooperate in or to commit violence in other situations. To such a moral sense, "conscientiousness" implies "consistency" and consistency demands that all cases grouped under a particular heading be treated in an identical manner.⁸⁶

85 P. Donnici "Governmental Encouragement of Religious Ideology: A Study of the Current Conscientious Objector Exemption from Military Service" (1964) 13 J of Pub L 16 16, at 44.

86 See Potter *supra* n. 40, at 58. A fascinating phenomenon that supports this claim is the radically different consideration granted by the media and the public to the three groups: young pacifists, selective objectors like Zonshein, and the recent letter of dissent signed by air force pilots. It is perceived that the "narrower" the focus of the act that is objected to – the more reproach it attracts.

What seems to underlie this argument, along with several others, is an *ex ante* suspicion that selective objectors claimants are not sincere in offering the reasons for refusal to serve. So much so, that it has been suggested that subjecting selective objectors to imprisonment is justified as it forces an estimation of his beliefs and thus roots out those whose objection is nonconscientious.⁸⁷

This is a sad observation. It leads to the conclusion that a nuanced position is not believed simply because it is nuanced. Due to the reluctance to grant credence to the beliefs of the selective objector, advantage is given to those who advocate extreme positions and are considered on the fringes of society. Even worse, it serves to alienate conscientious people who generally want to participate in the democratic game.

V. *A Right to Selective Conscientious Objection – the Implications*

We have examined the arguments that seek to distinguish between pacifism and selective conscientious objection, and found them wanting. Both groups of objectors rely equally on their right to freedom of conscience and no content-neutral test can explain why one's right is worthy while the other's is not. Though this paper does not deal with the material question of the limits of freedom of conscience, it does suggest that wherever the line is drawn, pacifists and selective objectors must find themselves on the same side. This does not, however, imply that we are arguing for a "new right" to selective conscientious objection any more than one who argues for commercial speech to be recognized as free speech is doing so.⁸⁸ The paper assumed that the principles that support the exemption of a pacifist's right to refuse military service are upheld by armies and by courts, and asserted that their application should cover,

87 See Greenawalt, *supra* n. 23, at 62, 72. Such reasoning has a long tradition. Indeed, the harshness of the English workhouses was justified by seeing them as a "self acting test of the claim" as "the instrument of relief was itself a test of relief" – Gertrude Himmelfarb *The Idea of Poverty* (London, Faber, 1984) 165.

88 E.g. H.C. 606/93 *Kidum v. The Broadcasting Authority* 38(2) P.D. 1; H.C. 5118/95 *Mayo Simon v. The Second Broadcasting Authority*, 49(5) P.D. 751. The analogy goes only that far, however, and should be taken to attest as to the author's position on whether commercial speech should be recognized on a par with various other forms of speech.

mutatis mutandis, selective conscientious objectors. They are both manifestations of human conscience and should be classified as types of the same constitutional phenomena. The effort to distinguish between the two types of objection is thus unjustified, morally arbitrary and legally discriminatory.

We emphasized that “content-neutral” tests of both groups would provide the same results, and here one qualification must be made. It is true that in some cases a democracy does not have to limit its arguments to content-neutral tests. By that we mean that there are “types” of conscience (or, for that matter, types of expression) that a liberal democracy would not tolerate and should not be forced to tolerate. Thus, an objector who substantiates his or her objection on racist grounds would not and should not be treated as a pacifist. But this argument has no bearing on the different treatment that pacifists and selective objectors are subject to.

But what, then, are the practical implications of this conclusion? To an extent, some doctrinal implications can be easily restructured to fit selective conscientious objectors. In other cases, since new factual scenarios may arise, there may be a need to construct a new framework of analysis based on the independent right to freedom of conscience. A few examples may be given to clarify our position.

Consider, first, the case of the “universal selective conscientious objector”. This slightly paradoxical title refers to a situation in which a young recruit refuses to enlist in the army at all, not because he (or she, in the Israeli case) believes that peace on earth will be attained by dismantling all the armies, but rather because the specific armed forces that have called for his service are engaged in what he sees as immoral acts, and he refuses to serve as a cog in such a machine. We see no reason to treat such a recruit any different from any pacifist, for the reasons outlined above. This case seems to exemplify the easiest scenario in which a selective conscientious objector can be accommodated, for this is where he and the pacifist are, for all practical purposes, in almost identical situations.

Once the non-pacifist individual enters the army, however, the analysis has to change. So a different situation arises where soldiers agree to serve in the army, but not to participate in a “project” (serving in the occupied territories, dismantling outposts). This second scenario, like the Zonshein case itself, is for many the paradigmatic case of selective conscientious

objection. We would find that recognizing a strong right to conscientious objection should have a bearing on the attitude towards such soldiers. Of course, guaranteeing a right to selective conscientious objection does not entail that the right is absolute. Like other cases of freedom of thought or conscience, once manifested in the real world, the right interacts with other rights and interests and therefore can be legitimately limited.⁸⁹ This is why, even if we do not doubt the sincerity of the beliefs underlying the acts, human sacrifice is not permitted. There is, however, a significant difference in relation to the current situation: while a soldier's objection to serve in the occupied territories is, under the current legal regime, automatically considered to be a refusal to obey a direct order, under the proposed understanding the order would be balanced against his *right* (currently not recognized at all) to obey his conscience. In general, it would seem that accommodation of the conscientious objector (relieving him from duty, or allowing him to serve in a position that does not violate his moral fibre) should be the rule of thumb.

Lastly, a situation of conscientious objection could be quite localized, where an erratic command is given by a commanding officer. Theoretically, the same framework outlined in scenario (2) applies here as well. But it may well be that such an order is given in a situation where there is little time to complain, to ask for special consideration or to protest. Contrary to the previous case, then, on these occasions considerations such as a life threatening situation or military discipline challenged in the heat of the battle might outbalance the right to freedom of conscience, where they would not be as weighty in the previous scenario. Thus, although it is possible to think of orders that are legal but still violate a soldier's conscience, it may well be that in most cases the soldier, if he decides to refuse the order, will have to prove after the fact that it was "blatantly illegal" and he had the justification for his refusal.

89 See BP Vermeulen "Conscientious Objection in Dutch Law" in A Giuffre, ed., *supra* n. 3, at 259, for a heavy reliance on the distinction between the absolute and inviolable nature of man's inner thoughts and their "external manifestations"

